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No. ——

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Fourteenth Amendment and the Commerce Clause permit a state to impose $50,000,000 as punitive damages on an interstate railroad for lawful personnel reductions in other states?

LIST OF PARTIES

Petitioner and respondent were the only parties in the courts below. Petitioner sued as surviving spouse of Paul Joseph Palank and as personal representative of his estate, and as mother, natural guardian and next friend of Taylor Rose Palank and Josef Paul Palank.

LIST PURSUANT TO RULE 29.6

Petitioner is wholly owned by CSX Corporation, whose stock is publicly traded. No publicly held company owns 10% or more of CSX's stock.

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ANGELICA ROSE PALANK,

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Petition for a Writ of Certiorari to the District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Florida District Court of Appeal, Fourth District, entered in this case on August 25, 1999.

OPINIONS BELOW

The opinion of the District Court of Appeal is reported at 743 So. 2d 556 and is reproduced in the Appendix at A. 3a. The order of that court denying rehearing and certification is unreported and is reproduced at A. 17a. The order of the Supreme Court of Florida denying review is unreported and is reproduced at A. 1a. The opinion of the Florida Circuit Court for the 17th Judicial Circuit is at A. 19a.

JURISDICTION

The judgment of the Florida District Court of Appeal was entered August 25, 1999, A. 3a, and its order denying rehearing and certification was entered November 5, 1999, A. 17a. A timely petition for review by the Supreme Court of Florida was denied March 15, 2000. A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, and the Commerce Clause, Article I, § 8, cl. 3, are reproduced at A. 39a.

STATEMENT

Respondent's decedent was a passenger killed when an Amtrak train derailed at Lugoff, South Carolina on July 31, 1991. The train was operated on petitioner's tracks. Respondent alleged that the derailment had been caused by a defective switch which had not been properly inspected and repaired.

Respondent as widow and personal representative brought suit in the Circuit Court for Broward County, Florida on behalf of the estate and survivors. Petitioner did not contest liability for compensatory damages, which a jury awarded in the amount of $6,140,000, and the Florida District Court of Appeal affirmed. 697 So. 2d 858 (Fla. App. 1997) (mem.).

A. *The Trial.*

Trial was then held before a second jury to determine whether petitioner should also be held liable for punitive damages and, if so, the amount. The fact that over a ten-year period petitioner and its five predecessor railroads had reduced the number of maintenance-of-way employees throughout its multi-state system became the focus of respon-

dent's claim for punitive damages. Respondent was allowed over objection to introduce evidence of reductions in maintenance-of-way personnel that had occurred from 1981 to 1993 throughout petitioner's multi-state system, following a series of mergers by several railroads that ultimately formed petitioner CSXT in 1986.[1] Respondent over objection presented evidence that such personnel reductions resulted in cost savings of $2.4 billion over ten years. Blaming downsizing for the accident, respondent's counsel emphatically and repeatedly urged the jury that the jury should punish petitioner for these employment reductions. For example:

> "There is a tremendous profit in cutting back on maintenance of way personnel, even if things go wrong, because of the amount of money that can be saved because the numbers are so great.
>
> "That will continue to happen with CSXT and with all other railroads unless somebody stops it."

Tr. 13447.

> "As you know from phase one, of course, the enhancement of profits from the cutback of maintenance of way personnel from 1981 up through 1993 is 2.4 billion dollars and change, I think 2.406 billion dollars."

Tr. 13853-54.

> "[W]e have seen that not counting the fringe benefits from 1981 to 1993 and 1997 dollars, that there has been a savings or an enhancement of profit of 2,406,000,000 —$2,406,000,203 from 1981 through 1993."

Tr. 13962.

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[1] Petitioner presented evidence that the system-wide reductions resulted from mechanization and technological advancements that improved efficiency and worker productivity. Tr. 10001, 10010-12, 10636-37, 10760.

"We've got the ill gotten gain of 2.4 billion dollars."

Tr. 13967.

> "The savings that they got by cutting maintenance of way forces is substantial. The costs of the derailments and whatever expenses they have by having a train derail are relatively small compared to the 2.4 billion dollars savings. And so what a verdict like this does is balance it, is balance the equation."

Tr. 13983.

Citing *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), petitioner requested that the jury be instructed: "You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida." CX 15, no. 9. However, the court refused to give such an instruction.[2]

The jury then awarded punitive damages of $50,000,000. In post-trial motions petitioner again argued that "[t]he jury should have been instructed . . . that the jury should not award money to deter future conduct, whether lawful or unlawful, outside its borders," and that such an instruction was "consistent with the dictates of *Gore* . . . and necessary given the evidence and plaintiffs' arguments to the jury." Memorandum Supporting Motions for Judgment Notwithstanding the Verdict, Remittitur and New Trial, Cir. Ct., at 44. Petitioner urged that under those cases "[p]ersonnel cutbacks by CSXT and its predecessors over an entire decade in states up and

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[2] Instead, the jury was instructed to consider, *inter alia*, "the nature, extent and degree of misconduct and the related circumstances" and "any other circumstances which may affect the outcome of punitive damages." Tr. 14068.

down the Eastern seaboard went far beyond Florida's legitimate interests in this case." *Id.* at 30.

However, the trial court denied petitioner's post-trial motions and entered judgment for the full amount of $50 million punitive damages plus costs. A. 19a.

B. *The Appeal.*

Petitioner appealed to the Florida District Court of Appeal, challenging the punitive award on the grounds, *inter alia*, that it was excessive under both state and federal law, and also that by punishing lawful conduct occurring in other states, the punitive award violated the Fourteenth Amendment and the Commerce Clause.[3] Again citing this Court's decision in *BMW of North America, Inc.* v. *Gore*, petitioner urged that "there was no evidence that there was anything remotely unlawful about the manpower reductions made by railroads across the Eastern seaboard throughout the 1980's" and that "constitutional restraints prohibit one state from imposing punitive damages in order to deter a defendant from engaging in lawful conduct in other states." Initial Brief of Appellant, Fla. Dist. Ct. App., at 33. Petitioner contended, as it had in the trial court, that "[t]he jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585." *Id.* at 43 n.39.

The Court of Appeal affirmed, citing its decision issued four months earlier in *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603 (Fla. App. 1998), *approved*, 749 So. 2d 483 (Fla. 1999). A. 12a. In that case, rejecting a

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[3] Petitioner also argued that the punitive award violated Fla. Stat. § 768.73 (1995), which at that time provided that punitive damages exceeding more than three times compensatory were presumed excessive unless demonstrated otherwise by clear and convincing evidence.

Tenth Circuit decision, the Florida court adopted the following position:

> "II. *Punishing Conduct Occurring Outside the State of Florida*
>
> "Owens-Corning next argues that the imposition of punitive damages should have been barred in this case under the Due Process Clause of the Fourteenth Amendment since the conduct of which Ballard complained was wholly unrelated to the State of Florida. In this regard, it cites to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).
>
> * * *
>
> "Only one federal case since *BMW* has addressed this question. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997), which involved tort claims for interference with contracts and prospective business advantage, the Tenth Circuit noted that, unlike in *BMW*, the defendant's conduct below would be tortious in any state. Still, the court held that, 'we read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states.' *Id.* at 637.
>
> "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive. The opinion ignores that, in *BMW*, the record specifically reflected that Alabama was seeking to impose the punitive damages award as a stance against BMW's nationwide policy. Since the policy was not considered tortious in several other states, the Court found that the effect of the award would be to sanction lawful behavior. In contrast, where the defendant's conduct is considered tortious in all 50 states, as here, the same due process concerns implicated in *BMW* do not arise."

739 So. 2d at 606. The Court of Appeal accordingly approved the admission of "evidence showing that CSX and its predecessors engaged in cutbacks of maintenance of way employees from 1981 through 1993, and that these cutbacks resulted in savings of approximately $2.4 billion for the company," even though "the evidence introduced was not limited to cutbacks in the Hamlet Division, where the derailment occurred." A. 7a-8a. The court held that "Evidence of corporate downsizing for profits was relevant to show a motive for CSX continuing such conduct." A. 8a.

Petitioner filed a timely petition for rehearing, and also moved to certify the case to the Supreme Court of Florida as one raising questions "of great public importance," see Fla. R. App. P., Rule 9.030(a)(2)(A)(v), including whether the trial court had violated the constitutional ruling of this Court in *BMW* by permitting the jury to consider evidence of petitioner's reductions in staffing in other states, and also by refusing the instruction "that punitive damages should not be awarded to deter lawful conduct outside Florida's borders," and imposing "liability for punitive damages through evidence attacking corporate down-sizing conduct taken by CSXT and its predecessor railroads all along the Eastern Seaboard." Appellant's Motion for Certification, Dist. Ct. App., 7; see *id.* at 7-8. The motion to certify was denied. A. 17a. The Supreme Court of Florida denied review. A. 1a.[4]

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[4] Discretionary review of issues within its jurisdiction was sought from the Florida Supreme Court, which under Florida law has jurisdiction to review, *inter alia*, express constructions by the District Court of Appeal of constitutional provisions, or certified questions. Fla. R. App. P., Rule 9.030(a); Fla Const., art. V, § 3(b)(3).

REASONS FOR GRANTING THE WRIT

Florida here has continued in its major departure from this Court's admonition that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996)(footnote omitted). This Court emphasized that "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. at 572 n.17. "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Id.* at 573. Yet in this case petitioner was punished, to the staggering sum of $50 million, for lawful personnel reductions that occurred in a system-wide area of more then twenty states. Florida by massive punishment seeks to displace Congress and regulate the system-wide personnel policies of a major instrumentality of interstate commerce.

Although the Tenth Circuit in *Continental Trend* concluded that *BMW* prevents such extraterritorial punitive action, the same Florida panel that decided this case explained that "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive." *Owens-Corning*, 739 So. 2d at 606. As the dissenting Florida Supreme Court Justice protested in that case, "I find this State through its judicial branch has absolutely no constitutional authority or jurisdiction to impose the penalty of punitive damages for the benefit of a nonresident of Florida [in that case] for a defendant's conduct that occurred outside this state." 749 So. 2d at 490 (Overton, J., dissenting). Nevertheless, Florida here has continued on that course.

I. THIS EXTRATERRITORIAL PUNISHMENT VIOLATES THIS COURT'S DECISION IN *BMW* v. *GORE*.

In *BMW* this Court noted with approval that "[t]he Alabama Supreme Court . . . properly eschewed reliance on

BMW's out-of-state conduct." 517 U.S. at 573. Florida, however, has taken exactly the opposite course. In conflict with other states and with federal courts applying *BMW*, here once again it has permitted punitive damages, in a gigantic amount, to punish conduct occurring in other states. Florida's departure from the jurisdictional limits which this Court has held the Fourteenth Amendment and Commerce Clause require calls for review and reversal by this Court.

A. *Violation of the Fourteenth Amendment.*

Under this Court's decisions applying the Fourteenth Amendment's Due Process Clause, Florida cannot require an interstate railroad to alter its nationwide personnel policy, or punish it for not having done so earlier. The decisions of this Court have applied that constitutional principle in many contexts, and punitive damages should not be an exception. *E.g.*, *Allied-Signal, Inc.* v. *Director*, 504 U.S. 768, 777 (1992)(state tax); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State"); *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938)(state tax); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 410 (1930)(contracts outside the state); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881)("No State can legislate except with reference to its own jurisdiction"). "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975); see also *New York Life Ins. Co.* v. *Head*, 234 U.S. 149 (1914)(state may not regulate terms of extraterritorial contracts).[5]

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[5] This is distinct from the separate due process violation occurring if interstate companies are subjected to multiple punishments by several states for the same conduct. *Cf. Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

That the state labels its extraterritorial regulation as "punitive damages" does not alter the constitutional violation. "The name given by the State to the imposition is not conclusive." *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 348 (1922). And even if Florida could, in some carefully tailored way, regulate railroad staffing policy in a manner confined within its borders, the Constitution certainly does not permit it without any allocation to do so outside them. See, *e.g.*, *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 120 S. Ct. 1022, 1028 (2000):

> "Because California's offset provision is not a reasonable allocation of expense deductions to the income that the expense generates, it constitutes impermissible taxation of income outside its jurisdictional reach. The provision therefore violates the Due Process and Commerce Clauses of the Constitution."

It is apparent also that extraterritorial punishment leads to especially enormous verdicts. Last year's *Owens-Corning* decision, which the Florida court here relied upon and which essentially construed the *BMW* extraterritoriality prohibition out of existence, was at $31,000,000 the largest punitive-damage award upheld in Florida up to that time. But that record did not hold for long; the $50 million upheld by the Florida court here quickly topped it, by $19 million.

B. *Violation of the Commerce Clause.*

The due process limitations on state extraterritorial punishment are of course reinforced by the Commerce Clause. It would be difficult to conceive a clearer example of improper state interference with interstate commerce than Florida's using gigantic punitive awards to regulate the personnel decisions of an interstate railroad operating throughout the eastern United States. Indeed, some of the staff reductions punished here were implemented years previously, not by petitioner, which did not come into existence until 1986, but by prede-

cessor railroads that never operated in Florida or South Carolina at all.

This Court has held on many occasions in many contexts that the Commerce Clause as well as the Due Process Clause prohibit states from imposing regulations on interstate commerce. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 194-95 (1994)(state regulation of milk prices affecting other states); *Allied-Signal, Inc.* v. *Director*, *supra* (state tax); *Healy* v. *Beer Inst.*, *supra* (extraterritorial beer-price controls); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 644 (1982)(state regulation of tender offers); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935)(state regulation of milk prices); *Fargo* v. *Hart*, 193 U.S. 490, 502 (1904)(state franchise tax). And of course "regulation can be as effectively exerted through an award of damages as through [other relief]." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *cf. Geier* v. *American Honda Motor Co.*, 68 U.S.L. WEEK 4425 (U.S. May 22, 2000) (state tort liability invalid because of conflict with federal regulation).

In particular, state attempts to enforce their policies on interstate railroads have regularly been invalidated by this Court. See, *e.g.*, *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945)(length of trains)("[t]he practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it"); *Norfolk & W. Ry.* v. *Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968)(state may not tax railroad rolling stock outside its borders); *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)(state may not "project the taxing power of the state plainly beyond its borders"); *Southern Ry.* v. *Kentucky*, 274 U.S. 76 (1927)(excessive franchise tax on interstate railroad); *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920)(railroad is "an organic system of wide extent" and Commerce Clause prevents "expos[ing] the heel of the system to a mortal dart"); *The Delaware Railroad Tax*, 18 Wall. 206, 229 (1874).

II. THE DECISION CONFLICTS WITH THE APPLICATION OF *BMW* v. *GORE* IN FEDERAL AND STATE CASES.

As the Florida court acknowledged in its *Owens-Corning* decision, Florida's interpretation of *BMW*'s extraterritoriality prohibition contradicts the understanding of that case by the Tenth Circuit. In *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the Tenth Circuit, after remand by this Court for reconsideration in light of *BMW*, concluded that "the punitive damages award must relate to conduct occurring within the state." 101 F.3d at 636. It further explained that, even if conduct in another state were tortious, *BMW* further "prohibit[s] reliance upon inhibiting unlawful conduct in other states;" therefore a jury should be restricted by instruction to considering only the state's interest in protecting its own citizens and economy. *Id.* at 637; see also *id.* ("[t]he total number of contracts, some of which might have been in other states, could have influenced the amount of the punitive award, as the jury instruction did not limit the jury's consideration to Oklahoma activities"). Nevertheless, the Florida court announced that "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive." *Owens-Corning*, 739 So. 2d at 606.

Also in conflict with Florida's rule is that of Indiana. In *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539 (Ind. App. 1999), *cert. denied*, 120 S. Ct. 1424 (2000), the Indiana court held:

> "[T]he record is clear that in closing arguments before the jury . . . . counsel invited the jury to return an award of punitive damages based on alternatives that would punish Ford for conduct occurring beyond the borders of this State. The jury complied. *Gore* prohibits extraterritorial sanctions and as such the trial court properly

> determined that the jury's punitive damages award unwittingly offended the U.S. Constitution."

705 N.E.2d at 561 (footnote omitted). The court added that "We assume that no jurisdiction condones the sale of defective products. Nonetheless it is up to each jurisdiction to make that determination for itself." *Id. Cf.* also *Oliveira* v. *Amoco Oil Co.*, 726 N.E.2d 51, 61-62 (Ill. App. 2000)("Illinois may not impose sanctions on violators of its law with the intent of changing the violator's conduct in other states if it was lawful where it occurred and had no impact on Illinois or its residents") (citing *BMW*). That respondent's decedent was a Florida resident does not permit Florida to extend its power to regulate and punish beyond its borders.

Florida here has again committed exactly the constitutional violation that the Tenth Circuit and Indiana eschewed. Respondent's counsel focused the jury—indeed, incessantly hammered the jury—to base punitive damages on the amount the railroad and its predecessors had saved from personnel reductions throughout the multi-state system over a twelve-year period. That, respondent's counsel repeatedly urged the jury, was what should be punished. See pp. 3-4, *supra*. And, because the court refused an appropriate restrictive instruction, that multi-state, lawful extraterritorial conduct was what the jury was allowed to punish.

Moreover, the personnel reductions which the jury punished were not unlawful, and for that reason also were protected from punishment by the Due Process Clause. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19, quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). It is no answer to say, as the Florida court did in *Owens-Corning*, that negligence is tortious wherever it occurs. The jurisdictional limitations on a state's power to punish for conduct outside its borders apply whether the conduct was tortious or not, as the Tenth Circuit

recognized in *Continental Trend*. Punitive damages are akin to criminal punishment, see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 281 (1994); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991), and states may not extend their criminal jurisdiction beyond constitutional limits. *Nielsen* v. *Oregon*, 212 U.S. 315, 321 (1909).[6] As the Indiana court recognized in *Ford*, "*Gore* prohibits extra-territorial sanctions." 705 N.E.2d at 561.

III. FLORIDA JURIES MAY NOT SET NATIONAL RAILROAD POLICY.

Petitioner has been punished by a Florida jury and court, to the tune of $50 million, for staff reductions and consolidations carried out by itself and several predecessor railroads that merged to form CSXT—a restructuring and downsizing that were designed to rationalize and try to bring more efficiency to a portion of this country's interstate rail transportation industry. Those personnel reductions from technological modernization were exactly the kind of efficiencies, leading to transportation cost reductions and improved profitability and viability of the interstate rail system, that Congress contemplated when it enacted railroad deregulation legislation in 1980. See Staggers Rail Act of 1980, 94 Stat. 1895, 1896-98 (1980), §§ 2, 3, codified in part at 49 U.S.C. § 10101a; see also *id.*, § 101(a), 94 Stat. 1898, 49 U.S.C.

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[6] Nor would there be any basis simply to assume that statutory or even common-law rules for tort liability are identical in all states. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir.)(if one assumed all state negligence law were the same, "one wonders what the Supreme Court thought it was doing in the *Erie* case"), *cert. denied sub nom. Grady* v. *Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995). In particular, state rules for whether, how, and by what standards punitive damages may be awarded vary enormously. See generally R. BLATT, *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 7.01 (1991).

§ 10101a(9)(federal policy "to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle").[7] *Cf Geier v. American Honda Motor Co., supra; Norfolk S. Ry. v. Shanklin,* 120 S. Ct. 1467 (2000). Those personnel reductions were not tortious; they violated no state or federal law; they violated no federal regulation of interstate rail carriers; and they were implemented in many states outside Florida. For Florida, based upon a jury's notion of appropriate national railroad policy, now to punish this railroad for lawful conduct, cannot be reconciled with this Court's holding in *BMW.*[8]

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

JOHN G. KESTER *
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June 9, 2000

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[7] See also H.R. Conf. Rep. No. 96-1430 (1980) at 79 ("The industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy").

[8] See also *United States* v. *Morrison*, 68 U.S.L. WEEK 4351, 4354 (U.S. May 15, 2000)(power to regulate the instrumentalities of interstate commerce is assigned to Congress); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 574 (1997)("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation"), quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

* Counsel of Record

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA
WEDNESDAY, MARCH 15, 2000

CASE NO.: SC99-29
Lower Tribunal No. : 4D98-3875,
4D97-3798

CSX TRANSPORTATION, INC.
Petitioner(s).

VS.

ANGELICA ROSE PALANK, ETC.
Respondent(s).

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Debbie Causseaux
DEBBIE CAUSSEAUX
Acting Clerk, Supreme Court

kt
Served:

Hon. Marilyn Beuttenmuller, Clerk
Gregg Howard Metzger
Parker D. Thomson
W. Kent Brown
John R. Hargrove
William G. Ballaine
Russell S. Bohn
Christian D. Searcy
Edna L. Caruso
A. J. Melkus
Hon. Arthur Franza, Judge
Hon. Carol Lee Ortman, Acting Clerk

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NOS. 97-3798 & 98-3875

CSX TRANSPORTATION, INC.,
a foreign corporation,
Appellant,

v.

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, deceased; and surviving spouse of PAUL JOSEPH PALANK, deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor,
Appellees.

Opinion filed August 25, 1999.

Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Arthur J. Franza, Judge; L.T. Case No. 92-22407 13.

John R. Hargrove of Heinrich Gordon Hargrove Weihe & James, P.A., Fort Lauderdale, and William G. Ballaine of Landman Corsi Ballaine & Ford P.C., New York, NY, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., and Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for appellees.

DELL, J.

This action arises out of the derailment of an Amtrak train which was traveling on CSX Transportation, Inc.'s ("CSX") tracks in Lugoff, South Carolina, on July 31, 1991. The decedent, Paul Palank, was a passenger aboard the train. He was the husband of Angelica Palank and the father of two minor children, Josef and Taylor Palank. Angelica Palank, as personal representative of the estate, sued CSX for the wrongful death of Paul Palank, seeking compensatory and punitive damages. CSX did not contest liability on Palank's compensatory damage claims, and this court affirmed the jury's award of $6.14 million in compensatory damages. *See CSX Transport., Inc. v. Palank*, 697 So. 2d 858 (Fla. 4th DCA 1997).

During the punitive damage phase of the trial, the jury determined that CSX was both directly and vicariously liable for the derailment, and awarded Palank $50 million. CSX moved for entry of judgment in accordance with its motion for a directed verdict and alternatively moved for a new trial or remittitur. The trial court denied CSX's motion for a directed verdict, new trial and remittitur, and granted Palank's motion for entry of the $50 million judgment. The trial court also entered a Final Cost Judgment for $294,487.59 in favor of Palank as the prevailing party. CSX appeals the punitive damage award on grounds that the trial court should have granted a directed verdict in favor of CSX, erred in denying CSX's motion for a new trial and erred in denying a remittitur. CSX also appeals the award of costs. We affirm.

CSX argues that the trial court erred in failing to grant a directed verdict in its favor because appellee did not prove that CSX's conduct was the equivalent of criminal manslaughter, as stated in *Jeep Corp. v. Walker*, 528 So. 2d 1203 (Fla. 4th DCA 1988).

In *White Construction Co. v. Dupont*, 455 So. 2d 1026 (Fla. 1984), the supreme court discussed the standard for determining whether a defendant has acted in a manner that would justify the imposition of punitive damages. The court reaffirmed the *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959), standard:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."

White, 455 So. 2d at 1029 (quoting *Carraway*, 116 So. 2d at 20 n. 12) (citations omitted). *See also Eastern Airlines. Inc. v. King*, 557 So. 2d 574, 578 (Fla. 1990) (citing *White* as the Florida standard for recovery of punitive damages).

In *Jeep*, this court quoted the holding from *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986):

> Punitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct. They are not intended as a means by which a plaintiff can recover extra damages. Thus, punitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong. Therefore, the question that must be answered utilizing the *Carraway* standard is whether [the defendant] exhibited a *reckless disregard for human life equivalent to man-slaughter....*

Jeep, 528 So. 2d at 1206 (citations omitted). Appellant correctly argues that *Jeep* equates the standard of proof for punitive damages to "a reckless disregard for human life equivalent to manslaughter." However, manslaughter is defined by section 782.07, Florida Statutes (1991), as ". . . the killing of a human being by the act, procurement, or culpable negligence of another. . . ."

> Culpable negligence is defined in the Jury Instructions as:
>
> [M]ore than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

Villafana v. State, 728 So. 2d 260, 260-61 (Fla. 5th DCA 1999). *See* Fla. Std. Jury Instr. (Crim.) at 69. *Chrysler* and *Jeep* therefore, relate the definition of what is required to sustain an award of punitive damages to the standard of culpable negligence, which is essentially the same standard as that used by the Supreme Court of Florida in *Carraway* and *White*. *See also First Healthcare Corp. v. Hamilton*, Case Nos. 98-1992 & 98-2477, 1999 WL _ _ _ _ (Fla. 4th DCA August 18, 1999). Each element set forth for proving culpable negligence is listed in the disjunctive. Likewise, in determining whether a party is liable for punitive damages under *Carraway*, the party seeking such damages can meet the standard by presenting proof of any one or any combination of the enumerated factors.

Here, the record shows the derailment occurred in the Hamlet Division of South Carolina. The cause of the derailment was a defective Orlon switch, the defect being a broken crosspin that had been broken for at least seven months prior to the derailment. The Orlon switch had been installed backwards ten years earlier, and part of the broken crosspin was buried under several inches of graphite ballast placed between the ties more than seven months prior to the derailment. The evidence further shows that a proper inspection would have revealed the broken crosspin. In addition, there is evidence that CSX had actual knowledge that the crosspin was defective because the record shows that CSX periodically greased a plate installed on the switch with graphite to make the switch operate.

The record contains evidence that, as early as 1987, the Federal Railroad Administration ("FRA") performed an extensive audit, more fully addressed hereafter, that revealed deficiencies in CSX's staffing and inspection practices. This evidence shows actual knowledge on the part of CSX as to what would constitute proper staffing and inspections. The record also contains evidence that CSX, for a period in excess of ten years before the derailment, began a systematic reduction in its maintenance of way employees (personnel who would have performed inspections and repairs), the resulting benefit to CSX amounting to approximately $2.4 billion. Additionally, CSX filed false safety inspection reports with the FRA stating that proper inspections were performed when they were not. The evidence presented is sufficient to support a jury finding that CSX's actions and conduct meets the standards set forth in *Carraway, White* and *Jeep* for an award of punitive damages.

Next, CSX argues that the trial court erred in denying its motion for a new trial. We will address only five of CSX's arguments with respect to this issue.

First, during the punitive damage liability phase of the trial, appellee presented evidence showing that CSX and its

predecessors engaged in cutbacks of maintenance of way employees from 1981 through 1993, and that these cutbacks resulted in savings of approximately $2.4 billion for the company. CSX contends that the trial court erred in admitting this evidence because it brought information regarding CSX's wealth before the jury during the liability phase and the evidence introduced was not limited to cutbacks in the Hamlet Division, where the derailment occurred. Evidence of corporate downsizing for profits was relevant to show a motive for CSX continuing such conduct. The evidence of downsizing and the testimony that the limited number of CSX inspectors could not conduct proper inspections of the lengths of track and switches to which they were assigned supports a jury finding of a conscious disregard for the safety of the public. The testimony that the apprentice foreman's supervisor directed him to file false inspection reports with the FRA also supports appellee's argument that CSX knowingly endangered public safety.

Second, CSX contends that the admission of Mrs. Palank's testimony regarding the loss of her husband during the trial on liability for punitive damages was prejudicial and amounted to error. Appellees correctly argue that ordinarily the same jury would hear evidence on both compensatory and punitive damages, and that the admission of this evidence was necessary for the jury to understand the nature of the underlying claim. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994). We agree and hold that the trial court did not abuse its discretion in allowing the jury to hear the limited evidence concerning the underlying compensatory damage claim.

Third, CSX contends that the trial court erred in allowing evidence of a 1987 FRA audit of the Baltimore Division of CSX's tracks because the audit related to a different division and occurred four years before the derailment.

Following a series of train accidents, the FRA conducted a safety audit of CSX's Baltimore Division, which consists of

approximately 5,000 miles of track across six states and the District of Columbia. The Baltimore Audit was based on interviews with numerous CSX officers and employees, a review of over 7,000 test records, inspections of trains, freight cars, tracks, signals, switches, inspection devices and turnouts. Although the audit indicated that the mainline track was in excellent condition, it stated that there were numerous defective conditions on the turnouts which should have been discovered and reported by CSX's inspectors. The report emphasized FRA inspectors' concerns regarding the inadequate training and number of maintenance of way employees, which they concluded threatened CSX's capacity to maintain the track over the long term.

The report stated: "In general, it is FRA's belief that: . . . The poor quality of track maintenance and repairs has led FRA to conclude that both line employees and supervisors in the Maintenance of Way Department are inadequately trained in both FRA and CSX maintenance standards." The report also stated that many inspectors were scheduled for five full days of inspecting, with no time allowances for duties such as making repairs, and the FRA suspected that some of CSX's inspectors were not able to cover their territories at the required frequencies. The report concluded:

> [M]any track foremen are not actually knowledgeable enough to perform maintenance tasks properly. A suspicion also arises as to the level of expertise of some members of supervision, especially in identifying poor quality work and having it corrected. These two conclusions result in the FRA being concerned over the training and qualifications of these individuals. Although the company has a formal set of maintenance standards, augmented by engineering bulletins, the FRA's observations in the field were that training is spotty and incomplete.

The report also stated:

> Of all the areas [illegible] developed during the safety audit, this one regarding the training, qualifications and abilities of the M[aintenace] of W[ay] people concerns the FRA the most. It is not possible to place enough emphasis on this and the deleterious effects it has been having on the physical plant of CSX.

The FRA also stated its concerns that the quality of track inspections was not acceptable because the records did not accurately reflect the conditions existing in the field and defective conditions were not being found or reported and that track inspection territories were too large to be covered at the required frequencies in an effective manner. The audit concluded that the major problem "lies in the shortage of quality inspectors, which in turn translates into overly large inspection districts and hurried cursory inspections."

Even though the deficiencies addressed in the audit were related to a separate division, the deficiencies were strikingly similar to those in the Hamlet Division. The evidence regarding the audit showed prior knowledge of dangerous similar conditions within the system. *See Lawrence v. Florida East Coast Ry. Co.*, 346 So. 2d 1012, 1015 (Fla. 1977); *Rodriguez v. Loxahatchee Groves Water Control Mgmt. Dist.*, 636 So. 2d 1348, 1350 (Fla. 4th DCA), *rev. denied*, 649 So. 2d 233 (Fla. 1994). Further, the FRA's general observations regarding the poor quality of track maintenance and repairs, as well as the lack of proper training and inspection practices of employees, provided CSX with ample notice of what was needed to provide proper training procedures and inspection practices. The audit, when considered in conjunction with the testimony concerning the inspection practices in the Hamlet Division, was relevant to demonstrate that CSX had actual prior notice that its practices in the Hamlet Division did not meet the FRA standards.

Fourth, CSX contends that the video deposition testimony of Allen Clamp was irrelevant and should not have been admitted because Mr. Clamp last worked for CSX five years before the derailment. Mr. Clamp testified that he worked as a track man for CSX's predecessor and then CSX; Mr. Clamp later worked as an apprentice foreman from 1983 to 1986 for Buster Bowers, the roadmaster who was responsible, in July of 1991, for inspection of the section of track where the derailment occurred.

Mr. Clamp testified that from what he was taught regarding track inspections and safety, it should have been obvious to CSX that there were too few men to perform the required safety inspections and maintenance. Mr. Clamp also stated that while he was working with Mr. Bowers, Mr. Bowers never performed a dissassembly inspection, never walked a switch and conducted no inspection or inadequate inspections by covering too much track too quickly. Mr. Clamp testified that Mr. Bowers directed him to fill out false inspection reports. His testimony shows that conditions similar to those in the Baltimore Division also existed in the Hamlet Division.

Mr. Clamp's successor, Robert Griffith, corroborated his testimony concerning the filing of fraudulent FRA reports regarding track and switch inspections. Although Mr. Clamp left CSX before the derailment, his testimony, along with that of Mr. Griffith, was relevant to show the course of conduct concerning the filing of false inspection reports to the FRA over the course of several years, including the time of the derailment.

Fifth, CSX contends that the trial court erred in allowing the jury to hear evidence regarding CSX's profits and its $5 billion net worth during the final stage of the trial. CSX argues that this evidence should not have been presented to the jury because an indemnity agreement existed between CSX and Amtrak, under which Amtrak would pay any punitive damage award.

CSX failed to present, and we have not found, any Florida law establishing the relevancy of an indemnity agreement that provides for the payment of punitive damages by a third party. Liability for punitive damages and the amount thereof is not determined from the assets of a third party nor from an agreement of a third party to pay such damages. In short, the indemnity agreement was not relevant evidence to the issue of the amount of punitive damages.

For the reasons stated above, we hold that CSX has failed to demonstrate that the trial court erred or abused its discretion in denying its motion for a new trial.

CSX also contends that the trial court should have granted a remittitur pursuant to section 768.73, Florida Statutes (1995), because the punitive damage verdict was excessive. Section 768.73 provides that a punitive damage award may not exceed three times the amount awarded for compensatory damages and is presumed excessive "unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *See Owens-Corning Fiberglas Corp. v. Ballard,* 23 Fla. L. Weekly D1077 (Fla. 4th DCA April 29, 1998), *rev. granted,* 722 So. 2d 193 (Fla. 1998).

Judge Franza's nineteen page order specifically details his findings in support of the $50 million verdict and the denial of appellant's motion for a remittitur. The order summarizes the testimony and evidence that supports the jury's verdict by clear and convincing evidence, and concludes, in part,

> Here, the clear and convincing evidence shows that upon the presentation of all the testimony and evidence and the conclusion of the trial, CSXT could neither negate nor mitigate the cost of its flagrant violation of the public trust. Keeping with the policy that punitive damages should punish and deter, a jury of six

reasonable persons concluded that $50 million would adequately communicate to this Defendant, that this type of reprehensible conduct should not and would not be tolerated.

The jury was presented with an enormous figure by the Plaintiff. However, this jury decided upon $50 million.[1] Finally, in rendering their $50 million penalty, jurors included a handwritten note [on the verdict form] to express their concern. They wrote, "*It is hoped that CSX trainers will emphasize [the] need to inspect both ends of crosspins.*"

These are not the words of a run away jury. This was a knowing cognoscente jury and their deterrent punishment, sting, if you will, was very reasonable in light of the assets of Defendant which the uncontradicted evidence showed, was over $5 billion.

. . . .

The knowledge that Defendant's conduct bespoke, an intentional disregard for human safety, was loud and clear. Defendant's repetitive and callous indifference eventually matriculated into an entire want of care without any regard or lack of conscience, for the safety and welfare of the public. . . .

This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. This evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and

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[1] In closing, appellees asked for between $275 million and $500 million.

convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is orderline criminal.

Here, critical rail personnel were cut away leaving virtually no way for the company to sufficiently ensure the safety of the rails. Despite Defendant's allegations that cutting-back maintenance of way personnel caused no hazard, the clear and convincing evidence does not support this contention.

. . . .

Clearly, Defendant knew of the peril created by its reductions and the company chose to proceed on its own course. The evidence showed that federal rail regulators warned the company and that management turned a deaf ear to those persons, just as it did to the company's own front line rail personnel.

In terms of the actual rail inspections, the clear and convincing evidence showed repeated patterns of carelessness. The company carelessly reported and accepted track inspection reports when it was blatantly obvious that the information was false.

However, most damaging was the cross pin itself. It told an entire story about the policy and manner in which Defendant administered its duty to provide safe rail to the thousands of railway passengers known to rely on the company. The evidence showed that to keep the device working, "standard" repairs often included jumping up and down on the switch and/or applying "grease" to the apparatus.

The clear and convincing evidence showed that for at least 7 1/2 months, the cross pin lay on the ground buried in granite ballast. The FRA, upon examining the

> rail north and south of the Orlon switch, found many defects including another missing cross pin.
>
> . . . .
>
> This Court does not find that the $50 million verdict in the instant matter was influenced by prejudice, passion, or corruption or that the jury misconceived the merits of the case. There is no question in this Court's mind that the jury based its verdict on the evidence presented to it. This Court also finds that the jury did not arrive at the amount of damages by speculation and conjecture. This jury accepted the Plaintiff's testimony and that of her witnesses.

(footnote omitted).

CSX argues that Judge Franza's characterizations that CSX's conduct "showed repeated patterns of carelessness" and "not only bespeaks culpable negligence, it is borderline criminal," contradicted his conclusion that punitive damages were warranted and the amount awarded was sustainable despite the statutory cap. Neither *Carraway* nor *Jeep* requires the conduct to be criminal, which would impose a standard of proof beyond a reasonable doubt, a standard much greater than that required for the recovery of punitive damages.

We hold that the evidence presented supports Judge Franza's conclusion that the jury properly awarded punitive damages. We also hold that the record supports Judge Franza's conclusion that appellees successfully rebutted the presumption of excessiveness of the punitive damage award. *See* § 768.74(5)(a)-(e), Fla. Stat. Further, we reject CSX's argument that the verdict was "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Lassiter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1976).

In summary, we hold that the trial court did not err in denying CSX's motions for a directed verdict, for a new trial or for remittitur. Accordingly, we affirm. We also affirm the trial court's award of costs in favor of appellee as the prevailing party.

AFFIRMED.

POLEN and STEVENSON, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

CASE NO.: 97-3798
97-3875
L.T. No.: 92-22407 13

CSX TRANSPORTATION, INC.
Appellant/Petitioner(s),

v.

ANGELICA ROSE PALANK, ETC.
Appellee/Respondent(s).

November 5, 1999

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed September 9, 1999, for rehearing is hereby denied; further,

ORDERED that appellant's motion filed September 9, 1999, for rehearing en banc is hereby denied; further,

ORDERED that appellant's motion filed September 9, 1999, for certification is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

William G. Ballaine	John R. Hargrove	Russell S. Bohn
A. J. Melkus	Christian Searcy	Daniel J. Fleming
Edna L. Caruso	W. Kent Brown	Todd Stewart
F. Gregory Barnhart		

ch

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

APPENDIX D

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 92-22497(13)

JUDGE: ARTHUR J. FRANZA

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, Deceased, and Surviving Spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor and JOSEF PAUL PALANK, a minor,

Plaintiffs,

v.

CSX TRANSPORTATION, INC., a foreign corporation

Defendant.

ORDER

This cause is now before this Court upon Plaintiff, Angelica Palank's Motion for Entry of Judgment, as well as Defendant, CSX Transportation, Inc.'s (hereinafter CSXT), Motion for Remittitur, Motion to Set Aside Verdicts and For Entry of Judgment In Accordance With Its Motion for Directed Verdict, and Motion for New Trial. Having heard the arguments of counsel, considered all briefs and supplements submitted by the parties, and being otherwise fully advised in the premises, this Court hereby finds as follows:

The instant matter arises from a train derailment that occurred in the town of Lugoff, South Carolina on July 31, 1991. Traveling at 79 miles per hour, Amtrak train Silver

Star No. 82 derailed at the Orlon switch on Mile Marker 329.6. After receiving a jury verdict of $6.1 million in compensatory damages, Plaintiff sought punitive damages against Defendant for the death of Paul Palank, her husband.

During the lengthy trial proceedings before this Court, Plaintiff argued that Defendant downsized its maintenance of way manpower, claiming that the company put profits before safety. Plaintiff further maintained that as a result, the company's divisions did not have enough men to inspect and maintain the equipment, let alone carefully inspect equipment pursuant to the rules of the FRA[1] as well as Defendant's own rules of procedure.

Plaintiff contented that with fewer people available to adequately conduct and complete rail inspections within the normal workday, CSXT compromised and seriously undermined the integrity of the inspection process. Furthermore, Plaintiff claimed that more manpower was consistently requested but Defendant failed to satisfy the request and more man power was never added except as gangs to do major projects from time to time.

Plaintiff sought to establish at trial that when Defendant did inspect the rails, inspections did not satisfy federal and corporate safety requirements. Plaintiff attempted to demonstrate through evidence that as part of the inspection process, maintenance personnel were required to ride-over tracks, looking to detect defects and other hazards. Plaintiff presented testimony which alleged that because of the company's inadequate maintenance of way staffing, inspectors conducted the ride-overs at improper rates of speed. Additionally, Plaintiff attempted to show that track inspectors failed to exit ride-over vehicles to conduct close-up inspections in instances where a sufficient inspection of the rail and equipment could not be conducted from afar.

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[1] Federal Railway Administration.

The testimony also attempted to show that because of the severe cutbacks in maintenance of way personnel, Defendant improperly relied upon uncertified crank hands to conduct rail inspections. Plaintiff argued that untrained crank hands accompanied and assisted certified track inspectors on inspections designed to detect potential track problems. Furthermore, Plaintiff sought to demonstrate negligence on the part of Defendant, alleging that some 7½ months before the derailment, the cross pin in the malfunctioning switch, fell from its secured position within the crank. Plaintiff asserted that months of negligently conducted rail inspections failed to detect and repair that hazard.

Plaintiff also agued that during the ten-year period preceding that derailment, key maintenance of way personnel fraudulently claimed that rail inspections had been completed when in fact the inspections were never conducted. In addition, Plaintiff argued that inspection reports were fraudulently engineered by maintenance of way personnel to skew safety reports to falsely reflect that rail track in the Hamlet Subdivision was safer then it actually was. Plaintiff asserted that the company's reports falsely claimed 18 hours of rail inspections, when only 5 and 6 hours could possibly be completed within a normal work day, given the available maintenance of way manpower.

In conclusion, Plaintiff challenged that Defendant, by placing bottom line profits over the safety of railway passengers, negligently breached its duty to maintain safe rail track in the Hamlet Subdivision. Accordingly, Plaintiff argued that Defendant's negligent conduct justifiably warranted punitive sanctioning. Upon the conclusion of the case, Plaintiff urged the jury to award a large penalty that would send a message to Defendant and adequately discourage the company from continuing to operate in the manner as alleged.

Defendant contended that punitive damages were not warranted. The company claimed that its conduct failed to

rise to the level of wrongdoing for which punitive sanctioning may be imposed. Defendant argued that the corporation, long before the derailment of Silver Star No. 82, made the reasonable business decision to mechanize rail operations. This mechanization Defendant argued, served to update the rail system consistent with industry practices.

However, Defendant conceded that mechanization ultimately saved the corporation billions of dollars by eliminating the need to maintain large maintenance of way work forces. Defendant contended that mechanization of the rail system resulted in more efficiency in ensuring rail safety, not hazards.

Defendant presented evidence claiming that with the mechanization, the Hamlet Subdivision enjoyed a ten-year history devoid of cross pin of similar mechanical failure. It was Defendant's contention that the malfunction on the morning of July 31, 1991, resulted from the unexpected and extraordinary failure of the switch and cross pin. Moreover, the company argued that prior inspections showed that the cross pin was in place and functioning properly prior to the derailment.

Defendant's evidence also attempted to show that maintenance of way personnel had sufficient time within which to conduct proper inspections and that proper inspections had been conducted. The company argued that maintenance of way inspectors conducting the inspection, utilized the most care in inspecting and maintaining safe rail track. Defendant further argued that at all times proceeding the tragic derailment, sufficient manpower was maintained, and that Defendant had no knowledge of any dangerous problems posed by the switch. Defendant maintained that rail inspections were conducted on the day before the accident by maintenance of way personnel on the rail track in question.

Upon the presentation of all the evidence and the conclusion of the lengthy trifurcated proceedings the jury

found and pronounced Defendant liable for $50 million in punitive damages.

The instant motions followed. Plaintiff now moves this Court to enter final judgment for the $50 million punitive damages penalty imposed by the jury and Defendant now moves this Court to remit the $50 million award to $18.3 million, three times the $6.1 compensatory damages previously awarded to Plaintiff. Alternatively, Defendant moves this Court to set aside the verdict and have judgment entered in its favor and/or to grant a new trial on the issue of punitive damages.

Citing substantial deficiencies in proof as grounds to modify and or rescind the conclusions reached by the jury and the accompanying penalty, Defendant contends that the $50 million award is contrary to the law and evidence. Furthermore, Defendant contends that remittitur of the $50 million punitive award is required pursuant to Section 768.73(1), Florida Statutes (1995).

Longstanding in our civil jurisprudence is the policy of permitting the harsh sanction of punitive damages to deter and punish egregious conduct. *BMW of North America, Inc. v. Gore,* —— U.S. ——, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996); *S & S Toyota, Inc. v. Kirby,* 649 So. 2d 916 (Fla. 5th DCA 1995). Unlike compensatory damages, this type of award is based in part, on juror emotion, as punitive damages also express society's collective outrage at unacceptable behavior. *American Cyananid Co. v. Roy,* 498 So. 2d. 859, 861 (Fla. 1986). The potentiality of an adverse punitive award suitably correlates the seriousness of this civil punishment to similar criminal laws designed to discourage the reckless disregard of public safety. *Ingram v. Pettit,* 340 So. 2d 922, 925 (Fla. 1976).

The sanctioned offender is deemed to have committed some private injury partaking of public wrong, worthy of an

additional monetary penalty separate from the actual damage compensated. *Chrysler Corp. v. Wolmer,* 499 So. 2d 823 (Fla. 1986); *Ingram,* 340 So. 2d 922 (Fla. 1976). The resulting sanction is then crafted to reflect the enormity of the offense. *Gore,* —— U.S. ——, 116 S. Ct. 1589. 134 L. Ed. 2d. 809 (1996).

However, not all conduct falls within the reach of the punitive sanction rod. Conduct warranting punitive damages must be more then gross negligence. *W.R. Grace & Company v. Waters,* 638 So. 2d. 502 (Fla 1994); *Como Oil Co., Inc. v. O'Loughlin,* 466 So. 2d. 1061 (Fla 1985); *White Construction Company, Inc. v. Dupont,* 455 So. 2d 1026 (Fla. 1984). Willful, wanton misconduct which although not criminal, is equivalent to criminal manslaughter[2] characterizes one standard by which punitive sanctions are permitted. *White* at 1029.

This standard of negligence may be easily likened to the standard of culpable negligence required to sustain a criminal manslaughter charge as both must be: (1) of a gross and flagrant character, evincing reckless disregard of human life of the safety of persons exposed to its dangerous effects; (2) an entire want of care which would raise the presumption of indifference to consequences; and/or (3) such wanton, reckless, or gross careless disregard of the safety and welfare of the public, that the conduct can be considered reckless indifference to the rights of others equivalent to an intentional

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[2] Section 782.07. Florida Statute (1996) defines manslaughter as:

> the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provision of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, punishable as provided in s. 775.082, s. 775.083. or s. 775.084.

violation of those rights. *Hodges v. State,* 661 So. 2d. 107 (Fla. 3d DCA 1995); *see also W.R. Grace,* 638 So. 2d 502 (Fla. 1994).

However, under a criminal standard, the negligence involved amounts to the "conscious doing of an act," i.e the following of a course of conduct which any reasonable person would know would likely result in death or great bodily harm to some other person even though committed without intention to injure. *Marasa v. State,* 394 So. 2d 544 (Fla. 5th DCA 1981).

Furthermore, notwithstanding the obvious difference between criminal and civil burdens of proof, criminal negligence goes an additional step in delineating culpable conduct. It further distinguishes culpability by imposing different, hasher punishments in instances where the culpable conduct results in death than that which only injury results. Where it is determined that death resulted from negligence, a higher penalty is generally imposed since negligence under those circumstances is deemed a felony whereas misdemeanor culpable negligence contemplates personal injury not resulting in death. *Murray v. State,* 328 So. 2d. 501 (Fla. 4th DCA 1976).

Alternatively, the conduct challenged under civil law also requires negligence which clearly evinces a reckless disregard of human life or the safety of persons exposed to its dangerous effects; i.e. (1) a complete lack of care which would raise a presumption of conscious indifference to the consequences, (2) a gross and careless disregard of public safety and welfare, or (3) reckless indifference to the rights of others which is the equivalent to an intentional violation of those rights. *White,* 455 So. 2d. 1026 (Fla. 1985); *S & S Toyota, Inc. v. Kirby,* 649 So. 2d. 916 (Fla. 5th DCA 1995). However, conduct warranting punitive damages does not specifically require that a harsher penalty be im-

posed where the negligent conduct results in death as opposed to injury.[3]

In the case *sub judice*, as a common carrier, Defendant was charged with a duty to exercise the highest degree of care in safely maintaining the rail track. *Edwards v. Jacksonville Coach Co.*, 88 So. 2d. 543 (Fla. 1956); *State v. Tavares & G.R. Co.*, 82 So. 833 (Fla. 1919). The clear and convincing evidence shows that, on the morning of July 31, 1991, traveling passengers relied on Silver Star No. 82 to safely transport them from Miami, Florida to the train's final destination of Washington, D.C. Unfortunately, they did not arrive as CSXT's duty had not been fulfilled.

Here, the clear and convincing evidence shows that the equipment which Defendant asserted as having eliminated the company's need for it's old policy of maintaining large maintenance of way manpower, was 25 to 40 years old. The testimony of Luther E. Bowers, the roadmaster and acting supervisor for the Hamlet Subdivision, revealed that no production gangs had been sent to that territory for some 11 to 12 years preceding the derailment of Silver Star No. 82. (Tr. 5/27 p. 36).

Different, more modern, and better equipment was available to this company in the way of safety precautions. The testimony of Donald E. Turney, the Assistant Vice President of Maintenance of Way, acknowledged that mechanization had no real significant impact upon inspection crews. (Tr. 5/29 p. 42). Yet, the company relied on and continued to use equipment almost a quarter of a century old, if not older, while claiming that the company had modernized operations. Top brass talked safety, but their corporate

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[3] However, in addition to culpable negligence, criminal manslaughter requires proof that the victim is dead and that the killing was not a justified or excusable homicide. *State v. Richards*, 639 So. 2d. 680 (Fla. 2d DCA 1994).

actions did not. Their attitude was fix it with the men you have, no matter what.

The clear and convincing testimony of corporate operating officers who testified at trial was that they acknowledged that all accidents are preventable. Here, the clear and convincing evidence shows that this tragic and unfortunate accident could have and should have never occurred. However, regulators did not regulate this carrier. They are great after the fact, but are needed before. In South Carolina, the FRA had one man for one state. This carrier was left to police itself, but did not.

The clear and convining evidence showed that a 1987 safety audit conducted on another division of track, the Baltimore Audit, should have alerted Defendant that its track and equipment in South Carolina and other places needed the company's immediate attention. Conducted four years before the derailment of Silver Star No. 82, the Baltimore Audit detailed many hazards. Surely that audit should have concerned and alerted CSXT. It did not.

Instead of heeding the red flags sent by federal regulators, Defendant repaired only what they were told to fix in Baltimore and by 1989, were in compliance in Baltimore but still were told they did not have enough men. However, from the obvious dangers exposed in the 1987 audit, CSXT officials should have had the common sense to check its rails throughout this railroad to see if the hazardous conditions were the same in other areas. Failure to do so is clear and convincing evidence that Defendant could have cared less about passenger safety and the obvious happening of a derailment in the future was inevitable if safety is either ignored or relegated to the back burner.

A report issued by the union further confirmed those cries. It was referred to as the "Inclima Report" and concluded that Defendant's manpower was insufficient. Yet, the testimony of Defendant's operating officer was that he never read the

report and had no intention of reading it. Neither Carpenter, a former CSXT president nor Epting or Smith, other CSXT management personnel, had read the report. (Tr. 5/7 p. 127, 150-52; 5/8 p. 38; and 6/26 p. 49).

Corporate eyes that did not look, therefore, did not see. Corporate ears that did not hear, therefore, were deaf to their worker's pleas. The testimony of Jerry R. Davis, a former CEO; Jerry Epting, Chief Engineer of Maintenance of Way; and Randall Smith, an Assistant Division Engineer, revealed that top management never saw the audit or acted on it. (Tr. 5/7 p. 147, 48; 6/26 p. 49; 5/7 p. 130). Furthermore, the testimony of Roadmaster Bowers was that he had asked corporate higher-ups for more men. James Rhoades, a claims adjuster for the area, also testified that common among worker complaints was the cry for additional staff. (Tr. 5/6 p. 149).

The clear and convincing evidence further showed that Defendant failed to adequately conduct inspections of the rails and equipment. Corporate representatives testified that two track inspectors rode the high rail, one looking to one side, and the other looking to the other side. Namely, "ride over" inspections conducted by Roadmaster Bowers and his assistant Casteal. However, the evidence showed that W. H. Casteal was not a FRA qualified inspector, but a crank hand who drove and assisted Bowers for 3 to 4 years. These inspections were not professional, not reasonable, and did not comply with CSXT or FRA regulations. It should have been known to eventually lead to, and end in tragedy.

The men upon whom Defendant relied to conduct company inspections, further testified that inspections were not conducted properly. By the roadmaster's own admission, inspections had been reported as being conducted when in fact, the claimed inspector was on vacation. (Tr. 5/21 p. 15). It was known that inspection reports were false, more like common knowledge. Robert B. Griffith and Allan W. Clamp,

Bower's assistants, both testified that Bowers falsely claimed he made inspections and that the 107 miles of territory claimed as covered by Bowers, could not possibly have been inspected. (Tr. 5/6 p. 26, 106, 111; 5/15 p. 106, 109, 110).

The clear and convincing evidence showed that inspectors checking switches, looked to see if the cross pin could be visualized. However, Bowers testified that he did not know that both ends of the cross pin could be visualized in the switch. (Tr. 5/21 p. 124). The evidence established that for 10 years, inspectors were inspecting a switch that had been installed backwards.

Furthermore, the testimony showed that inspectors would not and could not have visualized the cross pin on the day of, or the day before this incident relying upon their usual inspection practices. The testimony of William E. Gordon (a former Chief Inspector of the FRA), was that the cross pin in the Orlon switch had been broken and missing for at least seven months. (Tr. 4/21 p. 49-50). This was confirmed by the report of James Wildey, a metallurgist for the NTSB,[4] who stated that the pin suffered severe corrosion. This was indicative of Plaintiff's claim that the pin had been out months prior to the accident. Additionally, another metallurgist expert further confirmed that the pin was not in place as contended by Defendant. James Foster testified that metal fatigue had caused the pin to break, thus further corroborating Plaintiff's assertion. (Tr. 5/13 p. 27).

Upon the determination that Defendant's conduct warranted punitive liability here, the parties then presented evidence to assist the triers of fact in calculating the amount warranted. However, statutory guidelines must govern.[5]

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[4] National Transportation Safety Board.

[5] Although the legislature CAPS punitive damages at three-times the compensatory damages before deeming them presumptively excessive, jurors may neither be instructed nor informed of the statutory

Where a jury speaks to a defendant with a punitive sanction which three-times exceeds the compensatory liability, the award is presumed excessive. § 768.73(1). Florida Statutes (1995).[6] However, this presumption of excessiveness is rebuttable.

Presumptively excessive awards may stand only upon a demonstration by "clear and convincing evidence," that the sanction is not excessive in view of the facts and circumstances of the case at issue. *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983). Under this test of proof, the claimant seeking to uphold the presumptively excessive award must demonstrate that the evidence presented was of such a weight that within the minds of the triers of fact, there was no hesitation as to the allegation(s) sought to be

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limitation. § 768.73(8), Florida Statutes (1995). Nevertheless, the legislature has provided that courts closely scrutinize punitive damage awards for their adequacy staff or excessiveness while exercising caution and discretion in determining whether such an award should be modified or disturbed. § 768.74(6), Florida Statutes (1995).

[6] In pertinent part, Section 768.73(1) provides:

(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the tried of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of act.

established. Moreover, the evidence must be credible, precise, and so explicit that when testified to by the called witness, it was distinctly remembered and there was no confusion as to the facts in issue. *Id.*

Accordingly, for the presumptively excessive $50 million award to stand here, Plaintiff must show and persuade this Court, by clear and convincing evidence, that the evidence produced at trial was such that it created within the minds of the jury and now this Court, a firm belief or conviction as to the truth of the allegation(s) sought to be established.

Defendant now claims that the clear and convincing evidence fails to rebut the presumption that the $50 million is excessive in view of the facts and circumstances here. In addition, Defendant argues that the negligent conduct challenged by Plaintiff Palank fails to rise to the level of culpability warranting the harsh sanction of punitive damages. Accordingly, Defendant argues that remittitur is required, as the clear and convincing evidence fails to show that damages totaling eight-times the compensatory award, is proper here.

Limitation or modification of presumptively excessive punitive jury awards, permits close scrutiny of the reasonableness of the determined amount. § 768.74(3), Florida Statutes (1996).[7] In assessing whether the challenged conduct here warrants the $50 million financial penalty, this Court con-sidered the following criteria in light of the facts and cir-cumstances that were presented to the trier of fact:

(a) Whether the amount awarded was indicative of prejudice, passion, or corruption on the part of the trier of fact;

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[7] This provision provides:

> It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such award be adequate and not excessive.

(b) Whether it appeared as though the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the triers of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded was supported by the evidence and was such that the punitive damages amount could be adduced in a logical manner, by reasonable persons.

§ 768.74(5), Florida Statutes (1995).

Further guiding this Court were constitutional considerations guaranteed by the due process clause. However, permissible lines delineated by the Constitution neither require a simple mathematical calculation nor rigid comparison of actual and potential damages to the punitive sanction determined. Gore, ___ U.S. ___, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Instead, the Supreme Court has concluded that constitutional guarantees permit consideration of three factors: (1) the degree of reprehensibility demonstrated by the challenged conduct; (2) the disparity between the harm or potential harm suffered and the punitive damages awarded; and (3) the difference between the remedy and civil penalties authorized or imposed in comparable cases. *Id.* In applying these factors to punitive awards, the Court further added that reprehensibleness provides perhaps the most significant factor. *Id.*

Here, the clear and convincing evidence shows that upon the presentation of all the testimony and evidence and the

conclusion of the trial, CSXT could neither negate nor mitigate the cost of its flagrant violation of the public trust. Keeping with the policy that punitive damages should punish and deter, a jury of six reasonable persons concluded that $50 million would adequately communicate to this Defendant, that this type of reprehensible conduct should not and would not be tolerated.

The jury was presented with an enormous figure by the Plaintiff. However, this jury decided upon $50 million. Finally, in rendering their $50 million penalty, jurors included a handwritten note to express their concern. They wrote, "*It is hoped that CSX trainers will emphasize [the] need to inspect both ends of crosspins.*"

These are not the words of a run away jury. This was a knowing cognoscente jury and their deterrent punishment, sting, if you will, was very reasonable in light of the assets of Defendant which the uncontroverted evidence showed, was over $5 billion.[8]

Industry, especially carriers, must first be safe and then profitable. Not the other way around. Nonetheless, the relentless pursuit of big money has lead many chief operating officers to lose their sense of duty, morals, and ethics to do what is right so that a big enough sting or smart is needed. In this case, it is not only needed, it is justified. Their gross bonuses for coming in with a great bottom line would be better for the public if that money were used for more men and new equipment.

Undoubtedly, the public has the right to feel confident that it can go anywhere, from here to there on a public carrier without being maimed or killed. In too many instances, transportation carriers rely upon old antiquated equipment.

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[8] However, this figure reflects the value of the land at the time of purchase.

Defendant knew what the repercussions of their utter disregard for safety would lead to, and also knew that something terrible had to eventually occur. They are maintenance of way people. They are the carriers transporting freight and human life. They are the experts. Willful and wanton misconduct can only account for this derailment. The clear and convincing evidence showed that the happening of this accident was not only probable, it was inevitable. An accident of this magnitude had to happen.

Death to anyone could have been just around the next switch. The knowledge that Defendant's conduct bespoke, an intentional disregard for human safety, was loud and clear. Defendant's repetitive and callous indifference eventually matriculated into an entire want of care without any regard or lack of conscience, for the safety and welfare of the public. That was Defendant's legacy. That is what the jury addressed and that is what must be changed.

This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. The evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid the cost with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

Here, critical rail personnel were cut away leaving virtually no way for the company to sufficiently ensured the safety of the rails. Despite Defendant's allegations that cutting-back maintenance of way personnel caused no hazard, the clear and convincing evidence does not support this contention.

Defendant's mechanization argument failed to materialize then as it does now. The clear and convincing evidence showed that the only mechanization brought to the Hamlet Subdivision occurred some 11 to 12 years before the derailment of Silver Star No. 82. The clear and convincing evidence further established that even upon the mechanization of the rail system, live bodies were still required to conduct rail inspections. Yet, the clear and convincing evidence showed that the company continued to eliminate the maintenance of way manpower.

Clearly, Defendant knew of the peril created by its reductions and the company chose to proceed on its own course. The evidence showed that federal rail regulators warned the company and that management turned a deaf ear to those persons, just as it did to the company's own front line rail personnel.

In terms of the rail inspections, the clear and convincing evidence showed repeated patterns of carelessness. The company carelessly reported and accepted track inspection reports when it was blatantly obvious that the information was false.

However, most damaging was the cross pin itself. It told an entire story about the policy and manner in which Defendant administered its duty to provide safe rail to the thousands of railway passengers known to rely on the company. The evidence showed that to keep the device working, "standard" repairs often included jumping up and down on the switch and/or applying "grease" to the apparatus.

The clear and convincing evidence showed that for at least 7 1/2 months, the cross pin lay on the ground buried in granite ballast. The FRA, upon examining the rail north and south of the Orlon switch, found many defects including another missing cross pin.

Subsequent to the derailment of Silver Star No. 82, not one maintenance of way personnel was ever disciplined or fired. (Tr. 5/20 169, 70; 6/4 p. 111, 12; 6/9 p. 60) Despite the derailment, Defendant continues business as usual.

This Court does not find that the $50 million verdict rendered in the instant matter was influenced by prejudice, passion, or corruption or that the jury misconceived the merits of the case. There is no question in this Court's mind that the jury based its verdict on the evidence presented to it. This Court also finds that the jury did not arrive at the amount of damages by speculation and conjecture. This jury accepted the Plaintiff's testimony and that of her witnesses.

It is patently clear that the amount awarded for the death of Paul Palank was supported by the evidence, and was adduced in the logical manner by reasonable persons.

Old common law notions compel that the punishment befit the offense, so long as the punishment does not grossly exceed the severity of the violation, *Gore* —— U.S. ——, 116 S. Ct. 1589, 134 L. Ed. 2d 809, n. 24 (1996). Consequently, under the facts of this case, this Court will not substitiute its judgment for the constitutional judgment of the jury as the evidence meets the statutory criteria of "clear and convincing."

Upon first glance, the verdict rendered here appears to be a little high, but this figure is certainly not so unreasonably high as to shock the conscience of this Court. This Court refuses to now sit as the seventh juror with veto power, amending and altering the expressed outrage of those six persons who faithfully performed their duty to sit and listen to the evidence and decide the case as required by the law. This Court finds that $50 million punitive damage award bears a reasonable relation to the amount of damages proved and the injury suffered.

Here, the consequence of carelessness and greed resulted in death, the ultimate violation. The clear and convincing evidence shows that Silver Star No. 82's tragic derailment was caused by willful, wanton negligence, which is the functional equivalent of manslaughter. In lieu of this $50 million (a mere 1% of CSXT's net worth) is not too much. The clear and convincing evidence further shows that given the facts and circumstances evincing Defendant's egregious conduct and the company's apparent financial gains from this misconduct, Plaintiff has sufficiently rebutted the presumption of excessiveness attached to the $50 million punitive damage award.

In sum, this Court finds no showing of prejudice, passion or corruption on the part of the jury, no indication that the jury ignored the evidence or misconceived the merits of the case when it rendered its verdict; and no proof that the amount of damages was arrived at through speculation and conjecture. Absent a showing of egregious divergence from common sense and reason, a jury verdict should remain intact.

This Court finds that the $50 million punitive damages award for the loss of a 35-year-old husband, father, and otherwise productive human being, is not excessive and is supported by the evidence presented in this case. As such, this Court concludes that the verdict should stand as rendered by the jury, July 30, 1997.

Futhermore, as Defendant CSXT's Motion to Set Aside Verdicts and For Entry of Judgment In Accordance With Its Motion for Directed Verdict, and Motion for New Trial are primarily predicated upon the same arguments raised by its Motion for Remittitur, for the above stated reasons, the Defendant's motions also fail and are therefore denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Entry of ~~Judgment~~ is hereby GRANTED. Defendants' Motion for Remittitur, Motion for Directed Verdict in Accordance With Its Motion for Directed Verdict, and Motion for New Trial are DENIED.

DONE AND ORDERED in Chambers, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 9th day of October, 1997.

/s/ Arthur J. Franza
ARTHUR J. FRANZA
Circuit Court Judge

TRUE COPY

ARTHUR J. FRANZA
Senior Circuit Judge

cc: all counsel of record

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the Constitution of the United States, art. I, § 8, cl. 3, provides:

> SECTION 8. The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .